Supreme Court, U.S.
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No. 01-1456

In The

Supreme Court of the United States

IRA C. RITTER and THE KROGER CO.,

Petitioners,

v.

JERRY STANTON and RUTH A. STANTON,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

DAVID V. DORRIS
Counsel of Record
DORRIS LAW FIRM, P.C.
207 West Jefferson, Suite 601
Bloomington, IL 61701
(309) 820-9174

PATRICIA A. SMALL
WILLIAM L. BROOM III
BARRETT, TWOMEY, BROOM, HUGHES & WESLEY
100 North Illinois Avenue
Carbondale, IL 62901
(618) 457-0437

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court has jurisdiction to review the Indiana Court of Appeals' decision – which is in complete accord with and based upon well-established Indiana precedent – not to engage in a "comparability analysis" to evaluate the reasonableness of the award of compensatory damages in this case.

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REASONS FOR DENYING THE PETITION

The sole question presented by Petitioners is whether the Indiana Court of Appeals correctly held that the Seventh Amendment constrains a state appellate court when reviewing a jury award for excessiveness. Pet. at (i). Petitioners assert that the Court of Appeals *sua sponte* invoked the Seventh Amendment and concluded that the Amendment's prohibitions on reexamining jury determinations foreclosed it from comparing the compensatory damage award in this case to awards rendered in similar cases. Pet. at 9. They contend that the matter might have been decided differently if the court below had felt free to ignore the Seventh Amendment. Pet. at 13. However, the Court of Appeals did not hold what Petitioners claim it held. Additionally, the possibility that the court might adopt comparability analysis as a method of review if it disregards the Seventh Amendment is merely an illusion arising out of Petitioners' creative presentation of statements taken out of context.

The Petition should be denied because the actual ruling of the Court of Appeals presents no federal question and, therefore, this Court lacks jurisdiction over the matter. The decision is based on Indiana law, not the Seventh Amendment. What restrained the court below from engaging in a "comparative analysis" was "Indiana's historical regard of the uniqueness of every tort claim and the belief that compensatory damage assessments should be individualized and within the discretion of the factfinder." App. 32a. The court's conclusion that "because all cases are unique, the search for comparable or similar cases is inherently flawed," App. 31a, is a

secondary basis for the decision that also does not present a federal question.

Even if the decision of the Court of Appeals is construed to rest in part on the Seventh Amendment, jurisdiction is still absent for two reasons. First, in deciding not to engage in a comparability analysis to evaluate the compensatory damage award, the Court of Appeals did not primarily rely on the Seventh Amendment, but upon Indiana law that is an independent and adequate state ground for the decision. Second, the court's declaration that "the search for comparable or similar cases is inherently flawed," App. 31a, is another independent and adequate non-federal ground for the decision.

I. THE INDIANA COURT OF APPEALS' DECISION NOT TO ENGAGE IN A COMPARABILITY ANALYSIS IS BASED ON INDIANA LAW AND THE BELIEF THAT THE APPROACH IS "INHERENTLY FLAWED."

Dissatisfied that the Indiana Court of Appeals refused to ignore settled Indiana precedent and declined to conduct a comparability analysis to evaluate the jury's verdict, Petitioners try to persuade this Court to intervene by asserting that the Court of Appeals, contrary to this Court's established precedent that the Seventh Amendment does not apply to state court proceedings, held that the Seventh Amendment constrains a state appellate court when reviewing a jury award for excessiveness. Petitioners blatantly misstate the Court of Appeals' holding in a transparent effort to create a reviewable federal question where none exists.

In the court below, the parties disputed the method the court should use to evaluate the reasonableness of the jury's verdict. App. 23a. Petitioners contended that a comparability analysis is an appropriate method of review. *Id.* Respondents countered that Indiana courts do not use the comparability method when evaluating compensatory damages but, rather, evaluate each verdict individually based on the evidence presented in that particular case. *Id.* The Court of Appeals agreed with Respondents' position, stating in no uncertain terms:

> It is clear that Indiana courts have not previously adopted a comparability analysis for evaluating compensatory damage claims. More importantly, they have historically expressed disfavor in evaluating cases other than on their own merits.
>
> * * *
>
> Although it may be tempting to engage in such a comparative analysis to aid us in the difficult task of evaluating such a large award as is at issue in this case, *to do so would be a significant departure from Indiana's historical regard of the uniqueness of every tort claim and the belief that compensatory damage assessments should be individualized and within the discretion of the factfinder.* After reviewing all of the testimony and evidence presented to the jury, it is clear to us that such a departure is not necessary here.

App. 28a and 32a (emphasis added).

Petitioners maintain that the Court of Appeals felt bound by principles of Seventh Amendment law because the propriety of using comparability analysis remained an open question under Indiana law. Pet. at 6. Petitioners'

claim that the issue was unsettled is untenable. The court specifically discussed an Indiana case in which the exact method of review advocated by Petitioners, comparing damage awards in similar cases, was rejected:

> We noted that the appellant had documented numerous cases to show that the judgment in question far exceeded what had been allowed in Indiana and elsewhere for what it contended were comparable injuries. Yet, we concluded that "[w]e are not able to say the loss of any eye in one case is worth the same or just about the same in another case. If such a system is to be desired (and we express no sentiment for such idea) it must come from legislation. Our common law requires each case to rest finally on its own merits."

App. 27a (quoting *Kavanagh v. Butorac*, 221 N.E.2d 824, 828 (Ind.Ct.App. 1966)).

Only by ignoring the plain language of the opinion and cobbling together carefully selected statements taken out of context and presented out of sequence are Petitioners able to create the illusory appearance of a federal question. On the basis of scattered references to the Seventh Amendment, Petitioners assert that the Court of Appeals concluded that the Amendment's prohibitions on reexamining jury determinations foreclosed it from comparing the jury's award in this case to awards rendered in similar cases. No hint of any such conclusion appears in the court's explanation of why it would not engage in a comparative analysis to evaluate the reasonableness of the jury's verdict. *See* App. 32a ("to do so would be a significant departure from Indiana's historical regard of the uniqueness of every tort claim and the

belief that compensatory damage assessments should be individualized and within the discretion of the fact-finder"). Petitioners also twist the court's statement that "the Seventh Amendment constrains the ability of the judge to alter the award," App. 23a, into what they allege to be the holding of the court, specifically, that the Seventh Amendment constrains a state appellate court when reviewing a jury award for excessiveness. Noticeably absent, however, from all of the Court of Appeals' references to the Seventh Amendment and other statements quoted by Petitioners is any language supporting Petitioners' assertions that the statements are a finding, ruling, holding, or decision of the court.

This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). *See also Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions"). The observation in *Black* that "[a]t times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made," 351 U.S. at 298, is particularly apropos in this case. The Court of Appeals certainly appreciated the importance of the case, acknowledging that "the obvious concern raised on the face of this verdict is the great disparity between it and other compensatory damage awards in Indiana cases."[1] App. 28a. The Court of

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[1] Petitioners themselves emphasize the seriousness of the case by variously characterizing the jury's award as "the largest by far in Indiana history," Pet. at (i), "by many multiples the largest compensatory damages award in Indiana history," Pet. at 2, and "the single largest compensatory damages award ever rendered in Indiana." Pet. at 5.

Appeals' broad generalizations about the Seventh Amendment must be considered in the context of the court grappling with "the difficult task of evaluating such a large award as is at issue in this case." App. 32a.

This Court has a "duty to look beyond the broad sweep of the language and determine for [itself] precisely the ground on which the judgment rests." *Black*, 351 U.S. at 298. The Court of Appeals' decision rests on settled Indiana precedent.

When the pertinent section of the opinion[2] is considered in its entirety, it is apparent that the Court of Appeals decided to adhere to Indiana's long-standing approach for evaluating compensatory damage awards. In Indiana the " 'correct way to determine whether a verdict is excessive' " is "by first reconsidering the evidence introduced at trial." App. 26a (quoting *State v. Thompson*, 385 N.E.2d 198, 214 (Ind.Ct.App. 1979)). The court observed:

> The vast majority of Indiana cases simply consider whether the verdict was reasonable in light of the evidence presented at trial. Indeed, some cases have specifically stated that each case should be considered on its own evidence. For example, this court has stated that "[e]ach case will stand and fall on its own merit when an award is challenged as excessive, and an award will not be disturbed unless it is manifestly excessive."

App. 26a (footnote omitted) (quoting *Southern Indiana Gas & Elec. Co. v. Scoles*, 435 N.E.2d 287, 294 (Ind.Ct.App.

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[2] B. Method of Analysis at App. 23a-32a.

1982)). The Court of Appeals declined to engage in a comparability analysis to evaluate the jury's verdict in this case because "to do so would be a significant departure from Indiana's historical regard of the uniqueness of every tort claim and the belief that compensatory damages assessments should be individualized and within the discretion of the factfinder." App. 32a. Since the decision rests squarely on Indiana precedent, no federal question is presented for a plenary review by this Court.

To improve the chances of obtaining this Court's review, Petitioners raise the possibility of summary disposition rather than plenary review. Specifically, they argue that if this Court summarily reverses the judgment below and remands this case to the Court of Appeals, then the court, "disabused of its erroneous view of what the United States Constitution requires," Pet. at 15, may decide to adopt comparability analysis. In support of their argument, Petitioners claim that the court below found comparability review "tempting," App. 32a, but declined to adopt it because of an erroneous view of the Seventh Amendment. Pet. at 15.

The Court of Appeals is not likely to accept comparability analysis as an appropriate method for evaluating the reasonableness of the jury's verdict in this case. The court did not ultimately conclude, as Petitioners assert, that Indiana courts should not engage in comparability analysis. Pet. at 10. Instead, the Court of Appeals observed that in setting aside or reducing verdicts "some type of comparative analysis may, under certain circumstances, be necessary to evaluate particular types of damages or to determine whether the size of a particular verdict indicates jury passion or prejudice." App. 32a.

Nevertheless, although engaging "in such a comparative analysis" was "tempting" to the court to assist it in "the difficult task" of evaluating the award at issue in this case, the court unambiguously declared that "to do so would be a significant departure from Indiana's historical regard of the uniqueness of every tort claim and the belief that compensatory damage assessments should be individualized and within the discretion of the fact-finder." *Id.* A record "replete with evidence of devastating injuries, permanent disabilities, continuing pain and suffering, and loss of consortium" and containing "no indication that the jury acted out of prejudice, passion, or partiality," App. 46a, convinced the Court of Appeals that a departure from Indiana's traditional method for evaluating compensatory damage awards was not necessary in this case.[3] *See* App. 32a.

Any lingering doubt whether the Court of Appeals would render the same decision if it did not look to the Seventh Amendment for guidance is erased by the court's declaration that "because all cases are unique, the search for comparable or similar cases is inherently flawed." App. 31a. The court's reasoning was not influenced by the Seventh Amendment:

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[3] The court's extensive discussion of the testimony and evidence supporting its conclusion that the evidence "adequately supports the amount of the damages awarded," App. 44a, covers almost one-fourth of the opinion – approximately 11 of 48 pages. *See* App. 32a-43a. Although the Court of Appeals may have felt constrained in its ability to review the jury's award, evidently it did not feel prohibited from doing so.

> The nature and extent of pain and suffering are seldom, if ever, alike in any two cases. These differences in the details of the harms and the circumstances of plaintiffs inevitably make a comparison of the verdicts difficult if not impossible. The inherently subjective basis of awards for pain and suffering confounds the measurement and quantification required for an accurate comparison. There simply are no standards by which to measure the effects of injuries or to convert them into dollar amounts. Similarly, the data currently available to many courts is inadequate to support a viable system of comparative review. * * * The reported facts in these cases bearing on the level of nonpecuniary harm are often sparse or nonexistent. The comparison of cases can be easily manipulated, particularly when the factual bases for the awards in those cases are frequently not reported in great detail.

App. 31a. For the Court of Appeals, this case "perfectly illustrates" its concern with comparing damage awards to other cases:

> If this case were written in a manner similar to other reported personal injury cases, it would likely merely contain a summary of Stanton's injuries, probably consisting of something to the effect that he suffered severe injuries including a crushed pelvis, underwent multiple surgeries, and had several complications. The opinion would indicate that he is permanently disabled and will continue to have pain and complications from his condition. However, without a more thorough description of the injuries, the complications, the effects of the medical problems on his life, and the profound devastation

> the accident has caused him and his family, * * * it would be impossible for any other case to be compared accurately to this one.

Id. n.8. Since no federal question is presented and the Court of Appeals is unlikely to accept comparability analysis as an appropriate method for evaluating the reasonableness of the jury's verdict in this case, there is no basis for summary disposition by this Court.

This Court "is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented." *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 197 (1965). What compelled the Court of Appeals to decline to engage in a comparability analysis to evaluate the jury's verdict was not the Seventh Amendment but, rather, well-established Indiana precedent and a belief that comparability analysis is "inherently flawed." Clearly, no federal question is presented in this case. Quite simply, the court's few references to the Seventh Amendment are "a rather short thread with which to weave – let alone upon which to hang – [this Court's] jurisdiction." *Pennsylvania v. Labron*, 518 U.S. 938, 942 (1996) (per curiam) (Stevens, J., dissenting).

II. EVEN IF THE DECISION OF THE COURT OF APPEALS WAS INFLUENCED IN PART BY THE SEVENTH AMENDMENT, THE DECISION RESTS ON INDEPENDENT AND ADEQUATE NON-FEDERAL GROUNDS.

A. Inasmuch As The Court Of Appeals' Decision Rests Primarily On Indiana Law That Is Not "Interwoven With The Federal Law" And Is Sufficient To Sustain It, The Decision Rests On An Independent And Adequate State Ground.

Accepting only for the purposes of the following discussion that the Court of Appeals' decision not to engage in a comparability analysis was influenced by the Seventh Amendment, nothing in the opinion suggests that the Amendment was the sole, or even the principal, basis for the decision. As Respondents explain above, Indiana precedent strongly influenced the court. The question becomes whether the Indiana law upon which the Court of Appeals relied is an independent and adequate state ground for the decision. If it is, then "[this Court's] jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See also Herb*, 324 U.S. at 125 ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.")

This Court, of course, must "ascertain for itself * * * whether the asserted nonfederal ground independently and adequately supports the judgment." *Abie State Bank v. Weaver*, 282 U.S. 765, 773 (1931). To assist it in making such a determination, the Court adopted a conclusive presumption:

> [W]hen * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983). Because the Court of Appeals' decision does not fairly appear to rest primarily on or to be interwoven with the Seventh Amendment and the independence and adequacy of the cited Indiana law as a ground for the decision is apparent from the face of the opinion, the *Long* presumption is inapplicable in this case.

Reliance on this Court's precedents, discussion of and citation to federal cases, and discussion of and citation to state cases that rely on the Federal Constitution are characteristics common to decisions that rest primarily on federal law. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 37 (1996) ("Although the opinion below mentions Art. I, § 14, of the Ohio Constitution in passing[,] * * * the only cases it discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution."); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) ("Even the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments of the United States Constitution.") Decisions in which the asserted state ground is interwoven with federal law exhibit the same common characteristics. *See, e.g., Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per

curiam) ("In discussing the contours of [the Fifth Amendment] privilege, the court relied on our precedents."); *Labron*, 518 U.S. at 941 ("The Pennsylvania Supreme Court did discuss several of its own decisions; as it noted, however, some of those cases relied on an analysis of our cases on the automobile exception.") In sharp contrast is the Court of Appeals' opinion, which does not share even one of those characteristics.

In this case, the decision to reject comparability analysis does not "fairly appear[] to rest primarily on federal law." *Long*, 463 U.S. at 1040. Although the court below mentioned Seventh Amendment law, the exact language of the Seventh Amendment is not quoted in the opinion. Nor are any decisions discussing the Seventh Amendment cited – no decisions of this Court, or of other federal courts, or of the Indiana courts, or of the courts of any other state. In fact, if any citation of authority is even given for a reference to the Seventh Amendment, it is to a law review or journal article.

Conversely, the principles of Indiana law discussed by the court are fully supported by citation to Indiana cases. Moreover, the Court of Appeals' discussion of Indiana law is extensive and quite specific in comparison to the court's broad generalizations about the Seventh Amendment. Because it is evident from the opinion that the references to the Seventh Amendment were only being used by the Court of Appeals "for the purpose of guidance, and [did] not themselves compel the result that the court * * * reached," *Long*, 463 U.S. at 1041, Petitioners' complaint that the court did not provide a plain statement to that effect exalts form over substance. Clearly, the Court of Appeals primarily relied on Indiana

law, not the Seventh Amendment, in deciding not to conduct a comparability analysis to evaluate the jury's verdict.

The Indiana law upon which the decision is based is not "interwoven with the federal law." *Long*, 463 U.S. at 1040. Not a single one of the Indiana cases cited by the Court of Appeals in the relevant section of the opinion mentions the Seventh Amendment or relies on an analysis of cases involving the Seventh Amendment. Additionally, the organization of the opinion is such that the references to the Seventh Amendment form no part of the court's discussion of Indiana law.

Since the decision of the Court of Appeals does not primarily rest on the Seventh Amendment and the Indiana law upon which it is principally based is not interwoven with federal law, the Indiana law that the court relied on is an independent state ground for the decision. If the independent state ground supporting a decision is also "sufficient of itself to sustain the judgment, this [C]ourt will not assume jurisdiction of the case." *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1871). The Indiana law that the Court of Appeals relied on is more than adequate to support the court's decision.

In the course of its discussion of comparability analysis, the Court of Appeals mentioned several principles of Seventh Amendment law. *See, e.g.*, App. 23a ("The Seventh Amendment generally requires that the jury determine compensatory damages."); *id.* ("once the jury makes a decision about compensation, the Seventh Amendment constrains the ability of the judge to alter the award"). The court also separately discussed analogous

principles of Indiana law. *See, e.g.*, App. 24a ("awards for pain, suffering, fright, humiliation, and mental anguish are particularly within the province of the jury because they involve the weighing of evidence and credibility of witnesses"); *id.* 24a-25a ("Our inability to look into the minds of jurors and determine how they computed an award is, to a large extent, the reason behind the rule that a verdict will be upheld if the award falls within the bounds of the evidence."); *id.* 28a ("damages are particularly a jury determination and * * * appellate courts will not substitute their idea of a proper damage award for that of the jury"); *id.* ("We cannot invade the province of the jury to decide the facts and cannot reverse unless the verdict is clearly erroneous.") If all of the references to the Seventh Amendment are removed from the opinion, the Indiana law that remains is sufficient to sustain the court's decision not to engage in a comparability analysis. Therefore, the Indiana law cited by the court below is an adequate as well as independent state ground for the decision.

The Court's "role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law," *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984), is not implicated in this case. The Court of Appeals did not "narrowly construe[] its common-law authority to review jury awards to avoid a perceived conflict with the Seventh Amendment." Pet. at 10. Instead, the court applied Indiana law that is both independent from, but in harmony with, Seventh Amendment law and adequate on its own to support the decision.

When the decision of a state court "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, [this Court] require[s] that it contain a plain statement that [it] rests upon adequate and independent state grounds." *Rodriguez*, 497 U.S. at 182 (citation and internal quotation omitted). Otherwise, "ambiguity regarding the federal- or state-law basis" of the state court's decision "renders this Court's exercise of jurisdiction proper under *Michigan v. Long*." *Robinette*, 519 U.S. at 44 and 42 (Ginsburg, J., concurring). When, as in this case, the independence and adequacy of the state ground for the decision are apparent from the four corners of the opinion, a plain statement so declaring would be superfluous. Since there is no ambiguity regarding the independence and adequacy of the state-law basis for the Court of Appeals' decision not to evaluate the reasonableness of the jury's verdict by conducting a comparability analysis, this Court's jurisdiction is not triggered.

B. The Court Of Appeals' Rejection Of The Comparability Analysis Approach As "Inherently Flawed" Is An Independent And Adequate Non-Federal Ground For The Decision.

A second independent and adequate non-federal ground for the Court of Appeals' decision not to engage in a comparability analysis is the court's conclusion that "because all cases are unique, the search for comparable or similar cases is inherently flawed." App. 31a. Respondents note above that the Seventh Amendment played no part in the reasoning of the court supporting the conclusion. Furthermore, Petitioners are in no position to argue that this conclusion is not an independent and adequate

non-federal basis for declining to adopt comparability analysis as a method for reviewing a compensatory damage award for excessiveness. They themselves admit in the Petition that other courts of appeal have rejected comparability analysis, not for any constitutional reason, but simply because they find the approach "unilluminating." Pet. at 17. *See Soto v. United States*, 11 F.3d 15, 18 (1st Cir. 1993) ("[T]he infinite variables involved in an award for pain and suffering dictate that each case should be viewed by the unique facts presented and should not be controlled by judgments rendered in other cases."); *Sykes v. McDowell*, 786 F.2d 1098, 1105 (11th Cir. 1986) ("Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case and * * * each case must be determined on its own facts.") (Citation and internal quotation omitted.)

One of the "cornerstones" of the Court's refusal to decide cases in which there is an independent and adequate non-federal ground for the decision is the "avoidance of rendering advisory opinions," *Long*, 463 U.S. at 1040, that the Court is "not permitted to render." *Herb*, 324 U.S. at 126. If resolution of a federal question cannot affect the state court's decision, then "there is nothing for the Court to do." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). The court below resisted the temptation to conduct a comparability analysis to evaluate the jury's verdict because to do so would be an unnecessary "significant departure" from Indiana's traditional approach to evaluating compensatory damage awards. The decision is bolstered by the court's conclusion that "the search for comparable or similar cases is inherently

flawed." Since it is evident that the Indiana Court of Appeals would still decline to engage in a comparability analysis even if the Seventh Amendment is not taken into consideration, review by this Court, whether through plenary review or summary disposition, would "amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition.

Respectfully submitted,

DAVID V. DORRIS
Counsel of Record
DORRIS LAW FIRM, P.C.
207 West Jefferson, Suite 601
Bloomington, IL 61701
(309) 820-9174

PATRICIA A. SMALL
WILLIAM L. BROOM III
BARRETT, TWOMEY, BROOM,
HUGHES & WESLEY
100 North Illinois Avenue
Carbondale, IL 62901
(618) 457-0437

Counsel for Respondents,
Jerry Stanton and Ruth A. Stanton